(19,304.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 229.

HENRY VAN REED, PLAINTIFF IN ERROR,

vs.

THE PEOPLES NATIONAL BANK OF LEBANON, PENNSYLVANIA.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Papers on appeal to court of appeals	a	1
Summons	1	1
Warrant of attachment	2	1
Affidavit of Henry Van Reed	3	2
Affidavit of James W. M. Newlin	4	3
Certificate of notary's appointment	5	4
Notice of special appearance for defendant	6	4
Notice of motion to vacate warrant	7	5
Order denying motion to vacate warrant	8	5
Opinion of Mr. Justice McAdam	9	6
Notice of appeal to appellate division	9	6
Order of reversal	10	6
Order allowing appeal to court of appeals	11	7
Notice of appeal to court of appeals	12	8
Opinion of appellate division	13	8
Stipulation and waiver of certification	20	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 28, 1905.

	Original.	Print
Remittitur from court of appeals	21	13
Judgment of appellate division on remittitur	24	15
Order approving bond on writ of error	28	16
Bond on writ of error	30	17
Petition for writ of error	33	19
Order allowing writ of error	35	20
Opinion of court of appeals	36	21
Assignment of errors	44	25
Citation	46	26
Proof of service of citation	47	26
Writ of error	48	26
Clerk's certificate	51	28

a Court of Appeals.

HENRY VAN REED, Plaintiff-Appellant,
against
THE PEOPLE'S NATIONAL BANK OF LEBANON, PENNSYLVANIA,
Defendant-Respondent.

Papers on Appeal from Order.

Carrington & Pierce, attorneys for plaintiff, 115 Broadway, borough of Manhattan, New York city.
Moore, Wallace & Dudley, attorneys for defendant for the purposes of this motion only, 44 Cedar street, borough of Manhattan, New York city.

1 New York Supreme Court, Appellate Division, First Department.

Summons.

Supreme Court.

HENRY VAN REED, Plaintiff,
against
THE PEOPLE'S NATIONAL BANK OF LEBANON, Pennsylvania, Defendant.
Summons. Trial Desired in New York County.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, Aug. 5, 1901.

CARRINGTON & PIERCE,
Plaintiff's Attorneys.

Post office address and office, No. 115 Broadway, borough of Manhattan, New York city.

2 (Warrant of Attachment.)

The People of the State of New York to the sheriff of the county of New York, Greeting:

Whereas, an application has been made to the judge granting this warrant by Henry Van Reed, plaintiff, for a warrant of attach-

ment against the property of The People's National Bank of Lebanon, Pennsylvania, the defendant, in an action in the supreme court of the State of New York, in the county of New York, and it appearing by affidavit to the satisfaction of the judge granting this warrant that one of the causes of action specified in section 635 of the Code of Civil Procedure exists against the defendant to recover a sum of money only, to wit: the sum of two hundred and fifty dollars as damages for breach of contract, other than a contract to marry, and the affidavits showing that the defendant is a foreign corporation and the plaintiff having also given the undertaking required by law:

Now you are hereby commanded to attach and safely keep so much of the property within your county which the defendant, The People's National Bank of Lebanon, Pennsylvania, has, or which it may have at any time before final judgment in the action, as will satisfy plaintiff's demand of two hundred and fifty dollars, together with costs and expenses, and that you proceed hereon in the manner required of you by law.

Witness Hon. Leonard A. Giegerich, justice of the supreme court, at the New York county court house, in the city of New York, this sixth day of September, in the year one thousand nine hundred and one.

L. A. GIEGERICH,
Justice of the Supreme Court of
the State of New York.

CARRINGTON & PIERCE,
Plaintiff's Attorneys.

3 (Affidavit of Henry Van Reed.)

(Same Title.)

COUNTY OF NEW YORK, *ss:*

Henry Van Reed, being duly sworn, says: I am the plaintiff in this action. The summons in the action has been issued herein and is hereto annexed; I am a resident of the city and county of New York. The defendant is a national bank organized under the banking laws of the United States, and located and doing business at Lebanon, Pennsylvania. A cause of action exists in my favor against the defendant to recover a sum of money only as damages for a breach of contract, other than a contract to marry, arising out of the facts set forth in the affidavit of James W. M. Newlin, hereto annexed. Said cause of action was assigned to me on or about the 18th day of July, 1901, and I have since been and still am the owner thereof. No part of said claim has been paid, and I am entitled to recover from the defendant herein the sum of two hundred and fifty ($250) dollars over and above all counter-claims or offsets known to me.

No previous application has been made for a warrant of attachment in this action.

HENRY VAN REED.

Sworn to before me this 6th day of September, 1901.

MAXWELL DAVIDSON,
Notary Public (No. 119), New York County.

4 (Affidavit of James W. M. Newlin.)

(Same Title.)

STATE OF NEW HAMPSHIRE, }
County of Grafton, } ss.:

James W. M. Newlin, of Philadelphia, Pa., being duly sworn, says: I am the assignor of the claim sued herein. A cause of action exists in favor of the plaintiff against the defendant to recover a sum of money only as damages for breach of contract, other than a contract to marry, arising out of the following facts:

I am an attorney at law, duly admitted and authorized to practice law in the State of Pennsylvania. On the 6th day of March, 1899, at Philadelphia, Pa., I was employed as such attorney by the defendant, to collect a note for $5,000, held by the defendant, made by the Singerly Pulp and Paper Company, to the order of William M. Singerly, and endorsed by said William M. Singerly. At the time of such employment, the defendant paid me a retaining fee of $100, and it was agreed by and between the defendant and myself that I should receive a further contingent fee of 25 per cent. upon the amount recovered. Between March 6, 1899, and May 15, 1901, I rendered various services to the defendant at defendant's request in the course of my said employment. Said services consisted of an examination on the condition of the William M. Singerly estate (said William M. Singerly having died), the validity of the claims made by certain creditors for preference, the presentation of the claims and various negotiations had and advice given during the course of the proceedings. An aggregate of at least five days' time was spent by me in the course of said employment.

5 I am familiar with the value of legal services. The services rendered by me as aforesaid were of the value (over and above said $100 paid me), of the sum of two hundred and fifty ($250) dollars.

On or about May 15, 1901, the defendant decided to proceed no further in the matter, and so notified me, and terminated my said employment.

That thereupon by reason of the facts aforesaid, there became due and owing me from the defendant, the sum of $250 for the services rendered by me as aforesaid. That no part of the same has been

paid and there are no offsets or counterclaims thereto known to me. That thereafter and before the commencement of this action, I assigned my said claim to the plaintiff, who thereupon became the lawful owner thereof. During my employment by the defendant, I became well acquainted with its organization and its officers. The defendant is a national bank organized under the banking laws of the United States, and located and doing business at Lebanon, Lebanon county, Pennsylvania.

JAMES W. M. NEWLIN.

Sworn to before me this 6th day of August, 1901.
[SEAL.] GEO. W. WELLS,
Notary Public.

Certificate of Notary's Appointment.

THE STATE OF NEW HAMPSHIRE, County of Grafton, } ss:

I, Dexter D. Dow, clerk of the superior court of the State of New Hampshire, for said county of Grafton, a court of record, do hereby certify that Geo. W. Wells, Esq., before whom the foregoing and annexed instrument was subscribed and sworn to, was, at the time thereof, a notary public within and for the State of New
6 Hampshire, residing in said county of Grafton, duly appointed, commissioned and sworn and duly authorized to administer oaths and take the acknowledgement of deeds, and to all whose official acts as such, full faith and credit are due; and further, that I am well acquainted with his handwriting, and verily believe that the foregoing signature is genuine.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said court, at Haverhill, this 7th day of August, A. D. 1901.

[Seal of the Superior Court.]

DEXTER D. DOW, Clerk.

Notice of Special Appearance.

(Same Title.)

SIRS: Please take notice that we appear on behalf of the People's National Bank of Lebanon, Pennsylvania, as their counsel for the purpose, and only for the purpose, of moving to vacate the attachment granted herein, and that the said, The People's National Bank of Lebanon, Pennsylvania, does not appear generally in this action.

Dated September 11, 1901.

Yours, &c., MOORE, WALLACE & DUDLEY,
44 Cedar Street, Borough of Manhattan, New York City.

To Carrington & Pierce, Esqs., attorneys for plaintiff, 115 Broadway, borough of Manhattan, New York city.

7 Notice of Motion to Vacate Warrant.

(Same Title.)

SIRS: Please take notice that, upon the warrant of attachment granted herein on the sixth day of September, 1901, and the papers upon which it was granted, the undersigned will move this court at a special term, part I., thereof, to be held at the county court house, in the borough of Manhattan, city of New York, on the 16th day of September, 1901, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order vacating the said warrant of attachment and for such other and further relief as may be just, such relief being asked upon the following ground, among others, in that the said attachment was granted against a national bank organized and existing under and by virtue of the laws of the United States, contrary to the statute of the United States in such case made and provided, together with the costs of this motion.

Dated September 11, 1901.

MOORE, WALLACE & DUDLEY,
Attorneys for Defendant for the Purpose of This Motion Only, 44 Cedar Street, Borough of Manhattan, New York City.

To Carrington & Pierce, Esqs., attorneys for plaintiff, 115 Broadway, borough of Manhattan, New York city.

8 Order Denying Motion to Vacate.

At special term, part I., of the supreme court, held at the county court house, in the county of New York, on the 23rd day of September, 1901.

Present: Hon. David McAdam, justice.

HENRY VAN REED
against
THE PEOPLE'S NATIONAL BANK OF LEBANON, PENNSYLVANIA.

On reading the warrant of attachment herein and the papers on which the same was granted, viz., affidavit of Henry Van Reed, verified September 6, 1901; affidavit of James W. M. Newlin, verified August 6, 1901; certificate of Dexter D. Dow, clerk thereto attached; summons dated August 5, 1901; undertaking of American Surety Company, dated September 6, 1901; and on reading and filing notice of motion to set the attachment aside, dated September 11, 1901; and hearing Moore, Wallace & Dudley for said motion, and Carrington & Pierce, attorneys for the plaintiff, opposed,

Now, on motion of Carrington & Pierce, it is
Ordered, that the said motion to vacate and set aside said attachment be and the same is hereby denied, with ten dollars costs.
Ent.

D. McA., J.

(Filed and entered September 23, 1901.)

9 Memorandum Opinion of Mr. Justice McAdam.

VAN REED
v.
PEOPLE'S NAT. BANK OF LEBANON, PA.

In opposition to my own judgment (see 124 U. S. R., 721) and upon the authority of the cases decided by the courts of our own State, the motion to vacate the attachment will be denied, with $10 costs (81 N. Y., 385; 93 *id.*, 371). The question ought to be settled by the appellate division.

Notice of Appeal.

(Same Title.)

SIRS: Please take notice that the defendant herein appeals to the appellate division of the supreme court for the first judicial department, from the order of the supreme court entered herein in the office of the clerk of said court, in and for the county of New York, on the 23rd day of September, 1901, and from each and every part thereof.

Yours, &c., MOORE, WALLACE & DUDLEY,
Attorneys for Defendant for the Purposes of this Motion Only, 44 Cedar Street, Borough of Manhattan, New York City.

To Messrs. Carrington & Pierce, attorneys for plaintiff, 115 Broadway, borough of Manhattan, New York city; William Sohmer, Esq., clerk, &c.

10 Order of Reversal.

At a term of the appellate division of the supreme court, first department, held at the appellate division court house, county of New York, on the 13th day of December, 1901.

Present: Hon. Charles H. Van Brunt, presiding justice; Hon. Edward Patterson, Hon. Morgan J. O'Brien, Hon. Chester B. McLaughlin, Hon. Frank C. Laughlin, associate justices.

HENRY VAN REED, Respondent,
against
THE PEOPLE'S NATIONAL BANK OF LEBANON, PENNSYLVANIA, Appellant.

The defendant above named having appealed to the appellate division of the supreme court, first department, from the order made by the special term, New York county, dated September 23rd, 1901, and entered in the office of the clerk of New York county, September 23rd, 1901, denying defendant's motion to vacate the attachment granted herein and said appeal having come on to be heard at the November term, 1901;

Now, after hearing Percy S. Dudley, appearing specially for the appellant, and Carlton B. Pierce, appearing for the respondent, it appearing that the appellant is a national bank, claiming exemption from attachment under sec. 5242 of the U. S. Revised
11 Statutes, and it appearing that respondent claims the right to such attachment and the jurisdiction thereby acquired under section 4 of the act of Congress of July 12, 1882, and due deliberation having been had, and the court having decided against the claim of the respondent and in favor of that of the appellant,

Now, on motion of Moore, Wallace & Dudley, appearing specially as attorneys for the appellant, it is

Ordered that said order appealed from be and the same is hereby reversed with ten dollars costs and disbursements and that the attachment granted herein be and the same is hereby vacated with ten dollars costs.

Order Allowing Appeal to Court of Appeals.

At a term of the appellate division of the supreme court, first department, held at the appellate division, court house, in the county of New York, on the 7th day of February, 1902.

Present: Hon. Charles H. Van Brunt, presiding justice; Edward Patterson, George L. Ingraham, Edward W. Hatch, Frank C. Laughlin, associate justices.

HENRY VAN REED
against
THE PEOPLE'S NATIONAL BANK OF LEBANON, PENNSYLVANIA.

A motion having been made by the above named plaintiff for leave to appeal to the court of appeals from the order of this
12 court dated Dec. 13, 1901, and said motion having duly come on to be heard, and after hearing Carlton B. Pierce of counsel for the plaintiff, no one appearing in opposition, and upon reading and filing the affidavit of Carlton B. Pierce, verified January

22, 1902, and notice of motion thereto annexed, with admission of due service thereon on the attorneys for the defendant, and due deliberation having been had, it is

On motion of Carrington & Pierce, attorneys for the plaintiff,

Ordered that plaintiff's said motion for leave to appeal to the court of appeals from the said order of this court herein dated Dec. 13, 1901, and entered in the office of the clerk of the county of New York, January 4th, 1902, be and the same hereby is granted and said appeal allowed; and this court hereby certifies to the court of appeals the following questions which have arisen herein and which in its opinion ought to be reviewed by the court of appeals, viz:

1. Is the defendant exempt from attachment before judgment under section 5242 U. S. Revised Statutes?

2. Are the rights claimed by the plaintiff, to attachment against the defendant before judgment, and to the jurisdiction thereby acquired, preserved and given by sec. 4 of the act of Congress of July 12, 1882?

Notice of Appeal to Court of Appeals.

(Same Title.)

Please take notice that the plaintiff appeals to the court of appeals from the order of the appellate division, first department,
13 herein entered in the office of the clerk of the county of New York, on the 4th day of January, 1902, reversing the order of the special term and vacating the attachment granted herein, with costs.

Dated, New York, April 30th, 1902.

CARRINGTON & PIERCE,
Attorneys for Plaintiff, 115 Broadway, New York City.

To Messrs. Moore, Wallace & Dudley, attorneys for def't, appearing specially; to the clerk of the county of New York.

Opinion of Appellate Division.

(Same Title.)

Appeal by the defendant, The People's National Bank of Lebanon, Pennsylvania, from an order of the supreme court, made at the New York special term and entered in the office of the clerk of the county of New York on the 23d day of September, 1901, denying the defendant's motion to vacate a warrant of attachment theretofore granted in the action.

Percy S. Dudley, for the appellant.

Carlton B. Pierce, for the respondent.

LAUGHLIN, J.:

The action is brought to recover for legal services, the plaintiff being the assignee of the claim. The warrant of attachment was

granted on the ground that the action is on contract to recover a sum of money from a foreign corporation. The defendant appeared specially and moved to vacate the warrant of attachment on the ground that it was issued in violation of section 5242 of the
14 Revised Statutes of the United States, which provides as follows: "All transfers of the notes, bonds, bills of exchange or other evidences of debt owing to any national banking association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets, in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any State, county, or municipal court."

There being no evidence that the defendant is insolvent its solvency is to be presumed. (Market Nat. Bank of New York *v.* Pacific Nat. Bank of Boston, 64 How. Pr. 1.)

It was held in Robinson *v.* National Bank of Newberne (81 N. Y. 385) that this statute does not prohibit the issuing of an attachment against a solvent national bank; and in Raynor *v.* Pacific National Bank (93 N. Y. 371) the court held that the effect of the statute was to prohibit an attachment against a national bank which was insolvent or had committed an act of insolvency.

Subsequent to these decisions, Chief Justice Waite, in delivering the opinion of the court in the case of Pacific National Bank *v.* Mixter, (124 U. S. 721), in construing section 5242 of the United States Revised Statutes, after stating that said section was a re-enactment of section 52 of the original act (13 U. S. Stat. at Large, 115) and the amendment of section 57 adopted in 1873 consolidated, said:
15 "The fact that the amendment of 1873 in relation to attachments and injunctions in State courts was made a part of § 5242 shows the opinion of the revisers and of Congress that it was germane to the other provision incorporated in that section, and was intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank. But however that may be, it is clear to our minds that, as it stood originally as part of § 57 after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the State courts. That was evidently its purpose when first enacted, for then it was a part of a section which, while providing for suits in the courts of the United States or of the State, as the plaintiff might elect, declared in express terms that if the suit was begun in a State court no attachment should issue until after judgment. The form of its re-enactment in

the Revised Statutes does not change its meaning in this particular. It stands now, as it did originally, as the paramount law of the land that attachments shall not issue from State courts against national banks, and writes into all State attachments laws an exception in favor of national banks. Since the act of 1873 all the attachment laws of the State must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank."

That was a suit in equity by the receiver of a national bank against attaching creditors and sureties on bonds given by the bank to dissolve attachments, to reduce to his possession securities held by the sureties for their protection against liability and to restrain the attachment creditors from enforcing the attachment bonds on the ground that the attachments were unauthorized, illegal and void. At the time the attachments were issued the bank was embarrassed, its doors were closed and it was in charge of a bank examiner. It is, therefore, contended that the question as to whether this statute prohibited attachments against solvent national
16 banks was not necessarily involved in the decision of the case. While this may be conceded, it is evident that the opinion relates to national banks generally, whether solvent or insolvent, and seems to have been intended as an authoritative construction of the statute. We do not find that this case has been modified or distinguished by the Supreme Court. In Earle *v.* Pennsylvania (178 U. S. 449), which was not an action against a national bank, but was a case where an attachment had been issued against the bank as garnishee, Justice Harlan, in delivering the opinion of the court, said: "Sections 5234, 5235 and 5236 above quoted have reference to the affairs and property of national banks in the hands of receivers and the administration of its assets by the comptroller; and the words in section 5242, 'no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any State, county or municipal court,' are to be construed in connection with the previous parts of the same section declaring null and void certain transfers, assignments, deposits and payments made after the commission by the bank 'of an act of insolvency, or in contemplation thereof,' with the intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view to the preference by the bank of one creditor to another. Whatever may be the scope of section 5242, an attachment sued out against the bank as *garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others."

In that opinion no reference was made to the case of Pacific National Bank *v.* Mixter (*supra*), and we think, therefore, that the court did not intend to modify or limit its former decision. The appellant relies on the case of Bank of Montreal *v.* Fidelity Nat. Bank

(49 Hun., 607; 112 N. Y. 667), which was affirmed by the
17 court of appeals without an opinion on the authority of Pacific National Bank *v.* Mixter; but it appears from an examination of the record in the former case that the bank was insolvent at the time the attachment was issued, and that the motion to vacate the attachment was made by its receiver. The case fell clearly within the doctrine previously announced by the court of appeals in Raynor *v.* Pacific Nat. Bank (*supra*). Under these circumstances the mere fact that the affirmance of the order vacating the attachment was placed upon the authority of Pacific National Bank *v.* Mixter (*supra*) is no indication that the court of appeals intended to overrule its former decision and acquiesce fully in the broad construction of the statute by the Supreme Court of the United States. We have, therefore, no controlling precedent in this State since the Federal decision last mentioned. Our attention has not been called to any case arising since the decision of Pacific National Bank *v.* Mixter (*supra*), where the highest court of any State has attempted to distinguish or refrain from following the opinion there delivered. We find on investigation that the question has frequently arisen since that decision, and the courts have universally adopted the opinion of the Supreme Court as an authoritative construction of the statute in question. (First Nat. Bank of Kasson *v.* La Due, 39 Minn. 415 [1888]; Safford *v.* First Nat. Bank of Plattsburgh, 61 Vt. 373 [1889]; Planter's Loan & Sav. Bank *v.* Berry, 91 Ga. 264; 18 S. E. Rep. 137 [1893]; Freeman Mfg. Co. *v.* Nat. Bank of Republic, 160 Mass. 398 [1894]; Garner *v.* Second Nat. Bank of Providence, 66 Fed Rep. 369; Rosenheim R. E. Co. *v.* Southern Nat. Bank, 46 S. W. Rep. 1026 [Tenn. Ch. App. 1897]; Hazen & Quimby *v.* Lyndonville Bank, 70 Vt. 543 [1898]; Dennis *v.* First Nat. Bank of Seattle, 127 Cal. 453 [Jan. 1900].

The Revised Statutes were approved on the 22d day of June, 1874.

The provisions of section 5242, except the clause prohibiting
18 attachments, injunctions and executions, were a re-enactment of section 52 of the national currency act of 1864 (13 U. S. Stat. at Large, 115). The clause relating to attachments, injunctions and executions was first enacted by the act of Congress of March 3, 1873 (17 U. S. Stat. at Large, 603). By that act section 57 of the national currency act of 1864 was amended by adding thereto the clause in question in the following form: "*And provided further*, That no attachment, injunction or execution shall be issued against such association or its property before final judgment in any such suit, action or proceeding in any State, county or municipal court." Said section 57, at the time this amendment was engrafted thereon, read as follows: "*And be it further enacted*, That suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases: *Provided*,

however, That all proceedings to enjoin the comptroller under this act shall be had in a circuit, district or territorial court of the United States held in the district in which the association is located." (13 U. S. Stat. at Large, 116.)

It appears clearly that after this amendment and prior to the adoption of the State statutes the State courts were absolutely prohibited from issuing an attachment, injunction or execution against a national bank prior to judgment regardless of its solvency or insolvency. The subsequent enactment of this clause in section 5242 was not intended to modify such prohibition. (Freeman Mfg. Co. *v.* Nat. Bank of Republic, *supra*; Planter's Loan & Sav. Bank *v.* Berry, *supra*; Pacific National Bank *v.* Mixter, *supra*.)

It is conceded that section 5242 has not been expressly repealed, but it is contended by the respondent that the clause under
19 consideration has been repealed by implication by section 4 of the act of Congress of July 12, 1882, (22 U. S. Stat. at Large, 162), which provides as follows: "That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: "*Provided, however*, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

This statute is not inconsistent with the clause of section 5242 prohibiting the issue of warrants of attachments, injunction and executions against national banks by the State courts before judgment. The act of 1882 was intended to prescribe the forum for litigations by and against national banks, and does not relate to provisional remedy to be had in such actions. It was designed to prescribe the place where and the courts in which such actions may be prosecuted, but it was not intended to regulate the proceedure in such actions when brought. (Raynor *v.* Pacific Nat. Bank, 93 N. Y. 371; Petri *v.* Com. Nat. Bank of Chicago, 142 U. S. 644; Freeman Mfg. Co. *v.* Nat. Bank of Republic, *supra*.)

20 These views lead to the conclusion that the order appealed from should be reversed, with ten dollars costs and disbursements, and the warrant of attachment vacated, with ten dollars costs.

Patterson and McLaughlin, JJ., concurred; Van Brunt, P. J., and O'Brien, J., dissented.

Order reversed with ten dollars costs and disbursements, and attachment vacated, with ten dollars costs.

Stipulation and Waiver.

Pursuant to section 3301 of the Code of Civil Procedure, we hereby stipulate that the foregoing is a true copy of the original summons, warrant of attachment, affidavits of Henry Van Reed and James W. M. Newlin, certificate of notary's appointment, notice of special appearance of defendant, notice of motion to vacate warrant of attachment, order denying motion to vacate warrant, memorandum opinion of Mr. Justice McAdam, notice of appeal to the appellate division, order of reversal, order allowing appeal to court of appeals, notice of appeal to court of appeals, and opinion of the appellate division, and of the whole thereof, and we hereby waive certification of the same.

Dated Sept. 15, 1902.

CARRINGTON & PIERCE,
Attorneys for Plaintiff.
MOORE, WALLACE & DUDLEY,
Attorneys for Defendant for the Purposes of This Motion Only.

21 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 20th day of January, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, Clerk.

Remittitur, January 21st, 1903.

22 HENRY VAN REED, Appellant,
against
THE PEOPLES NATIONAL BANK OF LEBANON, PENNSYLVANIA, Respondent.

Be it remembered, that on the 22nd day of September in the year of our Lord one thousand nine hundred and two Henry Van Reed the appellant came here into the court of appeals, by Carrington &

Pierce his attorneys, and filed in the said court a notice of appeals and return thereto from the order of the appellate division of the supreme court in and for the first judicial department.

And The Peoples National Bank of Lebanon Pennsylvania the respondent afterwards appeared in said court of appeals by Moore Wallace and Dudley its attorneys.

Which said notice of appeals and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon, the said court of appeals this appeal having been submitted on the past of counsel for the appellant and signed by Mr. Percy S. Dudley of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is affirmed with costs, and the first question certified answered in the affirmative and the second in the negative.

23 And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the appellate division first department there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs and questions certified answered etc. as aforesaid. And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the appellate division in and for the first judicial department before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said appellate division before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the
State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, January 21, 1903.

I hereby certify that the preceding record contains a correct transcript of the proceedings on said appeal in the court of appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, Clerk.

24 At a term of the appellate division of the supreme court of the State of New York, held in and for the first judicial department, at the appellate division court house, in the county of New York, on the 20th day of February, 1903.

Present: Hon. Charles H. Van Brunt, P. J.; Hon. George L. Ingraham, Hon. Chester B. McLaughlin, Hon. Edward Hatch, Hon. Frank C. Laughlin, JJ.

HENRY VAN REED, Plaintiff,
against
THE PEOPLES NATIONAL BANK OF LEBANON, PENNSYLVANIA, Defendant.

The above-named plaintiff having appealed to the court of appeals from the order of the appellate division, first department, dated December 13, 1901, and entered herein in the office of the clerk of the county of New York on the 4th day of January, 1902, reversing the order of the special term and vacating the attachment granted herein, with costs; and the said appellate division having certified to the court of appeals, for its determination, the following questions, viz:

"1. Is the defendant exempt from attachment before judgment "under section 5242 U. S. Revised Statutes?

"2. Are the rights claimed by the plaintiff, to attachment
25 "against the defendant before judgment, and to the juris-
"diction thereby acquired, preserved and given by sec. 4 of "the act of Congress of July 12, 1882?"

And the appeal as appears by the remittitur filed herewith having duly come on to be heard, and the appeal having been submitted on the part of counsel for the plaintiff and argued by Mr. Percy S. Dudley, of counsel for the defendant; and the court of appeals, after due deliberation had thereon, having ordered and adjudged that the order of the appellate division of the supreme court appealed from herein be affirmed, with costs, and that the first question certified be answered in the affirmative and the second in the negative; and the said court of appeals having remitted the record herein and the proceedings in said court to the appellate division, first department, there to be proceeded upon according to law.

Now, therefore, on filing the remittitur from said court of appeals, and on motion of Moore, Wallace & Dudley, attorneys for the defendant, appearing specially, it is

Ordered, that the judgment of the court of appeals aforesaid be, and it hereby is, made the judgment of this court, with costs and disbursements to the defendant, to be taxed by the clerk of the court.

26 Appellate Division of the Supreme Court, First Judicial Department, Clerk's Office, New York City.

HENRY VAN REED
against
THE PEOPLES NATIONAL BANK OF LEBANON, PENNSYLVANIA.

I, Alfred Wagstaff, clerk of the appellate division of the supreme court in the first judicial department, do hereby certify that the foregoing copy order has been compared with the original thereof

filed in this office on the fourth day of March, 1903, and that the same is a correct transcript thereof, and of the whole of the said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of New York, this sixth day of March, 1903.

[SEAL.] ALFRED WAGSTAFF, Clerk.

27 [Endorsed:] Supreme court, appellate division, first department. Henry Van Reed, plaintiff, against Peoples National Bank, of Lebanon, Pennsylvania, defendant. Remittitur. Moore, Wallace & Dudley, att'y- for def't, 26 Liberty St., N. Y. C. Filed March 7, 1903.

28 Court of Appeals of the State of New York.

HENRY VAN REED, Plaintiff-Appellant,
vs.
THE PEOPLES NATIONAL BANK OF LEBANON, PENNSYLVANIA, Defendant-Respondent.

The plaintiff, Henry Van Reed, having filed his petition for a writ of error from the Supreme Court of the United States to the said court of appeals of the State of New York, and said petition having been this day duly allowed,

Now, it is *ordered* that the said Henry Van Reed file with the clerk of this court or clerk below a good and sufficient bond in the sum of two hundred & fifty dollars to the effect that if said Henry Van Reed shall prosecute his writ to effect, and if he fail to make his plea good, shall answer all costs, then this obligation to be void, otherwise to remain in full force and virtue, the said bond to be approved by this court.

Dated March 22, 1904.

ALTON B. PARKER,
Chief Judge of the Court of Appeals
of the State of New York.

29 [Endorsed:] Court of appeals Henry Van Reed plaintiff in error against Peoples National Bank of Lebanon Pennsylvania Copy of approval of bond Ray W. Jones 20 Broad St. New York.

30 Court of Appeals of the State of New York.

HENRY VAN REED, Plaintiff-Appellant,
vs.
THE PEOPLES NATIONAL BANK OF LEBANON, PENNSYLVANIA, Defendant-Respondent.

Know all men by these presents, that the American Surety Company of New York, having an office and principal place of business at number 100 Broadway, in the city of New York, is held and firmly bound unto the Peoples National Bank of Lebanon Pennsylvania, in the sum of two hundred and fifty dollars, lawful money of the United States of America, to which payment well and truly to be made, the American Surety Company of New York binds itself, its successors and assigns firmly by these presents.

Sealed with its seal.

Dated the 19th. day of March, 1904.

Whereas, the above named Henry Van Reed has prosecuted a writ of error to the Supreme Court of the United States to review the judgment rendered in the above entitled action,

Now, therefore, the condition of this obligation is such, that if the above named Henry Van Reed shall prosecute his writ to effect and if he fail to make his plea good, shall answer all costs, then this obligation to be void, otherwise to remain in full force and virtue.

AMERICAN SURETY COMPANY
OF NEW YORK,
By DAVID B. SICKLES,
Vice-President.

Attest:
[SEAL.] CORTLANDT S. VAN RENSSELAER, Attorney.

137896. K. J.

31 STATE AND COUNTY OF NEW YORK, *ss:*

On this 19th day of March, 1904, before me personally appeared David B. Sickles, vice-president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by the order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickles

further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickles, vice-president.

K. J. PEIRCEY,
[SEAL.] Notary Public, Kings County.

Certificate filed in New York county.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th. day of April, 1893, the following resolution was adopted and is still in force: "Resolved, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 19th. day of March, 1904.

[SEAL.] CORTLANDT S. VAN RENSSELAER, Attorney.

32 [Endorsed:] Court of appeals, State of New York. Henry Van Reed plaintiff in error against Peoples National Bank of Lebanon, Pennsylvania, defendant in error. Copy of bond on writ of error to Supreme Court of the United States. Approved as to form & sufficiency of surety March 22, 1904. Alton B. Parker, Ch. J.

33 Court of Appeals of the State of New York.

HENRY VAN REED, Plaintiff-Appellant,
vs.
THE PEOPLES NATIONAL BANK OF LEBANON, PENNSYLVANIA, Defendant-Respondent.

To the Hon. Alton B. Parker, chief judge of the court of appeals of the State of New York:

The petition of Henry Van Reed respectfully represents:

That on the 6th of September, 1901, a warrant of attachment was issued in this action by the petitioner to recover two hundred and fifty dollars against the property of the defendant, a solvent national bank, organized under the laws of the United States, located and carrying on business in the State of Pennsylvania.

That the defendant moved, at special term to vacate the attachment upon the ground that it was issued against a national bank contrary to the statutes of the United States and that the motion was denied.

That upon appeal to the appellate division the order denying the motion was reversed and the motion granted, two of the justices dissenting, but that leave was given to appeal to the court of appeals of the State of New York, and the following questions were certified for decision:

"First. Is the defendant exempt from attachment before judgment under section 5242 of the United States Revised Statutes?

Second. Are the rights claimed by the plaintiff (this petitioner) to attachment against the defendant before judgment and to the
34 jurisdiction thereby acquired, preserved and given by section 4 of the act of Congress of July 12th, 1882?"

That on or about the 20th of January, 1903 the said court of appeals ordered that the order of the appellate division appealed from should be affirmed and that the first question certified should be answered in the affirmative and the second in the negative, and entered a final order and judgment therein in favor of the defendant and against petitioner's right specially set up and claimed under a statute of the United States and remitted the record herein and the proceedings in said court of appeals to the appellate division, first judicial department of the supreme court; and the said appellate division thereupon ordered that the judgment of the said court of appeals aforesaid be made the judgment of the supreme court; and on March 7th, 1903, the record, proceedings, papers and said orders were filed in the office of the county clerk of the county of New York.

That the said court of appeals of the State of New York is the highest court of the State of New York in which a decision can be had in this suit.

That in said final judgment petitioner respectfully represents that certain errors have been committed to the prejudice of your petitioner:

First. In affirming the order of the appellate division;

Second. In answering the first question in the affirmative;

Third. In answering the second question in the negative.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the said court of appeals of the State of New York, and that a
35 transcript of the record, proceedings and papers duly certified may be sent to the Supreme Court of the United States.

Dated New York, March 2 1904.

HENRY VAN REED.

County of New York, } ss:
State of New York, }

Henry Van Reed the petitioner above named, being duly sworn, says the facts set forth in the foregoing petition are true.

HENRY VAN REED.

Sworn and subscribed before me this 2d day of March, 1904.

HARRY W. ACTON,
Commissioner of Deeds in and for the City of New York.

Order.

The writ of error prayed for in the foregoing petition is hereby allowed, and bond is fixed at $—, and all proceedings stayed.

Dated Albany, March 22, 1904.

ALTON B. PARKER,
Chief Judge of the Court of Appeals
of the State of New York.

36 Court of Appeals.

Henry Van Reed, Appellant,
v.
The People's National Bank of Lebanon, Pa., Respondent. } No. 6. C. M. O. P. G. H. V.

Appeal by permission from an order of the appellate division of the supreme court in the first judicial department reversing an order denying a motion to vacate an attachment and granting said motion.

On the 6th of September 1901 a warrant of attachment was issued in this action against the property of the defendant, a solvent na-

tional bank, organized under the laws of the United States, located and carrying on business in the State of Pennsylvania. The defendant moved at special term to vacate the attachment upon the ground that it was issued against a national bank contrary to the statutes of the United States, but the motion was denied. Upon appeal to the appellate division the order denying the motion was reversed and the motion granted, two of the justices dissenting, but leave was given to appeal to this court, and the following questions were certified to us for decision:

"First. Is the defendant exempt from attachment before judgment under section 5242 of the United States Revised Statutes?

"Second. Are the rights claimed by the plaintiff, to attachment against the defendant before judgment and to the jurisdiction thereby acquired, preserved and given by section four of the act of Congress of July 12th, 1882?

Carleton B. Pierce for appellant.

Percy S. Dudley for respondent.

VANN, J.:

The questions certified depend upon the construction of certain statutes of the United States, and such construction will be aided by investigating their history.

37 By section 53 of the national currency act, approved June 3rd, 1864, all transfers, assignments, etc., made in contemplation of insolvency by a banking association organized under the act, were declared void. Section 57 of the same act, after naming the courts, including various state courts, in which actions might be brought against national banks, continued as follows: "Provided, however, that all proceedings to enjoin the comptroller under this act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located" (13 U. S. Stat. at Large, p. 116, ch. 106, §§ 52 & 57).

By the act of March 3rd, 1873, section 57 of said act was amended by adding thereto the following: "And provided further, that no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action, or proceeding in any State, county, or municipal court" (17 U. S. Stat. at Large, p. 603, ch. 269, § 2).

By the act to revise and consolidate the statutes of the United States in force on the first day of December 1873, approved June 22, 1874, section 52 of the original act and said amendment of section 57 were consolidated in section 5242 by attaching the latter at the end of the former, but not in the form of a proviso (U. S. R. S. § 5242).

The only other statute that is claimed to have any bearing upon the questions presented is an act to enable national banking associations to extend their corporate existence, approved July 12th, 1882 (22 U. S. Stat. at Large, p. 162, ch. 290). By section four of that act the rights and privileges, as well as the duties, and liabili-

ties of any banking association extending the period of its succession in accordance with the act, are preserved with this proviso: "That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than,
38 the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."

In 1880, the right to issue an attachment against the property of a solvent national bank was sustained by this court upon the ground that the prohibition of section 5242 applies only to insolvent corporations or those about to become so. (Robinson *v.* National Bank of Newburne, 81 N. Y. 385, 392.)

In 1883, the right to issue an attachment against the property of an insolvent national bank was denied by this court. It was further held that section 5242 was not repealed by the act of July 12th, 1883, because the latter relates to the jurisdiction of courts to entertain suits and the former to particular proceedings in such suits. (Raynor *v.* Pacific National Bank, 93 N. Y. 371.)

In 1887, the subject was considered by the Supreme Court of the United States. (Pacific National Bank *v.* Mixter, 124 U. S. 721.) In that case it appeared that a national bank became embarrassed on the 20th of November, 1881 " and was placed in charge of a bank examiner, in whose control it remained until March 18th, 1882, when its doors were opened for business with the consent of the Controller of the Currency." In March and April 1881, while it was a going concern and so far as appears solvent, attachments were issued against its property and it was held that they were void. The broad doctrine was laid down by Chief Justice Waite, with whom all the justices concurred, that an attachment could not issue out of a State court against the property of a national banking association whether solvent or insolvent. The court said: " The fact that the amendment of 1873 in relation to attachments and injunctions in State courts was made a part of § 5242 shows the opinion of the revisers and of Congress that it was germain to the other provision incorporated in that section, and was intended as an aid to
39 the enforcement of the principle of equality among the creditors of an insolvent bank. But however that may be, it is clear to our minds that, as it stood originally as part of § 57 after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the State courts. That was evidently its purpose when first enacted, for it was part of a section which, while providing for suits in the courts of the United States or of the State, as the plaintiff might elect, declared in express terms that if the suit was begun

in a State court no attachment should issue until after judgment. The form of its re-enactment in the Revised Statutes does not change its meaning in this particular. It stands now, as it did originally, as the paramount law of the land that attachments shall not issue from State courts against national banks, and writes into all State attachment laws an exception in favor of national banks. Since the act of 1873, all the attachment laws of the State must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank." (P. 726.)

It was also held that the act of July 12th, 1882, did not repeal the prohibition by which the remedy of attachment is taken away altogether, so that it "cannot be used under any circumstances."

In 1889, the subject was considered by the court of appeals for the third time in an action in which an attachment had been issued against a national bank on the 18th of June 1887 and a receiver of the bank was appointed nine days later. The special term denied the motion to vacate, but the general term reversed and vacated the attachment. Upon appeal, this court affirmed "on the authority of Pacific National Bank *v.* Mixter," *supra.* (Bank of Montreal *v.* Fidelity National Bank, 17 N. Y. St. Rep. 86; 112 N. Y. 667.)

Assuming that the banking association in that case was insolvent when the attachment was granted, still it is to be observed that this court did not cite its own *Raynor* case which involved an insolvent bank, as the authority for its judgment, but cited the *Mixter* case, in which it was held that an attachment against a national bank whether solvent or insolvent is void.

We think, and such is the recollection of Judge Gray, the only member of the present court who participated in that decision, that it was the intention of this court to yield its previous views to those expressed by the Supreme Court of the United States upon the subject.

All the courts of last resort in the different States, that have passed upon the question, have held that the prohibition of the Federal statutes applies to all national banks, regardless of their pecuniary condition. (Freeman Manufacturing Co. *v.* National Bank of the Republic, 160 Mass. 398; Planters' Loan & Savings Bank *v.* Berry 91 Ga. 264; First National Bank of Kasson *v.* La Due, 39 Minn. 415; Dennis *v.* First National Bank of Seattle, 127 Cal. 453; Stafford *v.* First National Bank of Plattsburg, 61 Vt. 373; Rosenhein Real Estate Co. *v.* Southern National Bank, 46 S. W. Rep. (Tenn.) 1026) The same conclusion was reached by the circuit court of the United States for the southern district of New York. (Garner *v.* Second National Bank of Providence, 66 Fed. Rep. 369.)

The power to create national banks carries with it the power to protect them by conferring special rights, privileges and immunities. In 1873 Congress evidently thought that the efficiency of these institutions might be impaired if attachments were issued out of the State courts against their property, and it, therefore, prohibited such writs, among others, altogether. The only question be-

fore us is whether that is still the effect of the acts of Congress as they now stand. While the use of the words, "such association" in section 5242 would justify the construction contended for by the appellant that the prohibition is confined to associations which have committed an act of insolvency, the court of last resort for the construction of Federal statutes has decided the other way, and we are bound by its conclusion. (Pacific National Bank *v.* Mixter, *supra.*)

We do not think the opinion in that case is obiter so far as
41 it applies to a solvent bank, for as we understand the statement of facts the Pacific national bank was solvent when the attachments were issued against it. While it became embarrassed six or seven months later, it does not appear that it was insolvent or had committed an act of insolvency, or had done anything in contemplation of insolvency, when the attachments were issued or levied. The chief justice obviously did not write an elaborate opinion to show that an attachment could not issue against an insolvent bank, for that was not open to question. It has always been conceded that the statute at least prohibits an attachment against an insolvent bank, but the question considered and decided was whether an attachment could be issued against a solvent bank. That was a live question still open in that court and there is no suggestion, either in the statement of facts or the opinion, indicating that the court regarded the question before it as different from the question now before us. The first question certified to us should, therefore, be answered in the affirmative.

The second question involves the effect of the act of July 12th, 1882, but this requires no discussion as it has already been held by the Supreme Court of the United States, as well as by ourselves, that said act did not repeal the earlier acts of Congress prohibiting attachments against national banks. (Pacific National Bank *v.* Mixter, *supra;* Raynor *v.* Pacific National Bank, *supra.*)

42 The argument is made that if the defendant had been a foreign State bank with funds here, our courts could have acquired jurisdiction *in rem* through the process of attachment, and that hence the same jurisdiction exists over the property of a foreign national bank situated in this State. This construction of the later act, however, would violate the spirit of all the acts relating to the subject when read together. We agree with the appellate division that "the act of 1882 was intended to prescribe the forum for litigations by and against national banks, and does not relate to provisional remedies to be had in such actions. It was designed to prescribe the place where and the courts in which such actions may be prosecuted, but it was not intended to regulate the procedure in such actions when brought."

Nor, we might add, was it intended to so regulate the method of commencing an action as to enable a State court to acquire jurisdiction over the property of a national bank, without acquiring juris iction of the bank itself.

We think that the order appealed from should be affirmed with

costs; that the first question certified should be answered in the affirmative and the second in the negative.

43 [Endorsed:] C. M. O. P. G. H. V. No. 6 Court of appeals Henry Van Reed, app'll't, *v.* The People's National Bank of Lebanon, Pa. resp't. Opinion by Vann, J.

44 Court of Appeals of the State of New York.

HENRY VAN REED, Plaintiff-Appellant,
vs.
THE PEOPLES NATIONAL BANK OF LEBANON, PENNSYLVANIA, Defendant-Respondent.

Assignment of Errors.

Now, March 2, 1904, comes the above plaintiff and files herewith his petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

I. In ordering that the order of the appellate division of the supreme court of the State of New York, granting the motion to vacate the attachment, be affirmed:

II. In answering the first question: "Is the defendant exempt from attachment before judgment under section 5242 of the United States Revised Statutes?" in the affirmative:

III. In answering the second question: "Are the rights claimed by the plaintiff to attachment against the defendant before judgment and to the jurisdiction thereby acquired, preserved and given by section 4 of the act of Congress of July 12th., 1882," in the negative.

For which errors the plaintiff, Henry Van Reed, prays that the order or judgment of the court of appeals of the State of New York, dated January 20. 1903, be reversed, and a judgment entered for the plaintiff, Henry Van Reed, and for costs.

RAY W. JONES,
Attorney for Plaintiff in Error.

45 [Endorsed:] Supreme Court of the United States. Henry Van Reed plaintiff in error against People's National Bank of Lebanon Pennsylvania defendant in error Assignment of errors Rec'd M'ch 24, 1904 Ray W. Jones 20 Broad St. New York.

46 UNITED STATES OF AMERICA, *ss:*

To the Peoples' National Bank of Lebanon, Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office in and for the county of New York, wherein Henry Van Reed is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Alton B. Parker, chief judge of the court of appeals of the State of New York, this 22nd day of March, in the year of our Lord one thousand nine hundred and four.

ALTON B. PARKER,
Chief Judge of the Court of Appeals of the
State of New York.

47 [Endorsed:] Supreme Court of the United States Henry Van Reed plaintiff in error against Peoples National Bank of Lebanon Pennsylvania defendant in error Citation Rec'd M'ch 24 1904 Ray W. Jones 20 Broad St. New York

On this 24th. day of March, in the year of our Lord one thousand nine hundred and four, personally appeared Frank Odell before me, the subscriber, John S. Wise Jr. a notary public in and for the county of New York and makes oath that he delivered a true copy of the within citation to Percy S. Dudley of the firm of Moore, Wallace & Dudley, attorneys for the Peoples' National Bank of Lebanon, Pennsylvania, at No. 26 Liberty street, borough of Manhattan, New York city.

FRANK ODELL.

Sworn to and subscribed the 24th. day of March, A. D. 1904.

[Seal of John S. Wise, Jr., Notary Public, New York Co.]

JNO. S. WISE, JR.

48 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the State of New York before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had

in the said suit between Henry Van Reed, plaintiff-appellant, and The Peoples' National Bank of Lebanon, Pennsylvania, defendant-respondent, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of
49 a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened to the great damage of the said Henry Van Reed, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 24th day of March, in the year of our Lord one thousand nine hundred and four.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States
for the Southern District of New York, in the
Second Circuit.

Allowed by

ALTON B. PARKER,
Chief Judge of the Court of Appeals
of the State of New York.

50 [Endorsed:] Supreme Court of the United States. Henry Van Reed, plaintiff in error, against Peoples' National Bank of Lebanon, Pennsylvania, defendant in error. Writ of error. Received M'ch 24, 1904. Ray W. Jones, 20 Broad St. New York.

51 STATE OF NEW YORK, }
County of New York. }

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, Thomas L. Hamilton, clerk of the county of New York and of the supreme court of the State of New York for the said county of New York by virtue of the annexed writ of error which was served upon me on the 24th day of M'ch 1904 and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 29 inclusive contain a true and complete transcript of the record and proceedings had in said court in the suit Henry Van Reed *vs.* The Peoples National Bank of Lebanon, Pennsylvania, mentioned in said writ of error as the same remain of record and on file in my office and that annexed hereto *is* the petition for said writ of error the citation to the writ in error with proof of service of the same the said writ of error served upon me (the bond and approval thereon, and the assignments of errors) with a copy of the opinion of the court of appeals.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at my office in the city and county of New York on the 26th day of March 1904.

[Seal of New York.]

THOS. L. HAMILTON, Clerk.

Endorsed on cover: File No. 19,304. New York court of appeals. Term No. 229. Henry Van Reed, plaintiff in error, *vs.* The Peoples National Bank of Lebanon, Pennsylvania. Filed April 21st, 1904. File No. 19,304.

FILE COPY.

Supreme Court U. S.
FILED
APR 1 1905
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 229.

HENRY VAN REED,
Plaintiff in Error,

v.

THE PEOPLES NATIONAL BANK OF LEBANON, PENNSYLVANIA.

In Error to the Court of Appeals of the State of New York.

BRIEF FOR PLAINTIFF IN ERROR

JAMES W. M. NEWLIN,
For Plaintiff in Error.

Intelligencer, 229 Chestnut St.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1904.

HENRY VAN REED, PLAINTIFF IN ERROR,
v.
THE PEOPLES' NATIONAL BANK OF LEBANON, PENNSYLVANIA. } No. 229.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an appeal from an order of the Court of Appeals of the State of New York vacating an attachment (p. 21).

Plaintiff is the assignee of a claim against the defendant for professional services as attorney (2 to 4). Plaintiff's assignor resides in Philadelphia, Pa. (3). Defendant is a national bank, located at Lebanon, Pa. (2).

Plaintiff, a resident of New York, commenced his action there by levying an attachment against funds of the defendant in that State, the ground of the attachment being that the defendant is a foreign corporation (1-2).

Defendant appeared specially, and moved to vacate the attachment as prohibited by the United States Revised Statutes (4). The Special Term denied the motion (6). The Appellate Division reversed the Special Term, and vacated the attachment (8). Two judges dissented (13).

The Appellate Division allowed an appeal to the Court of Appeals (7) certifying two questions, viz.: (8).

1. Is the defendant exempt from attachment before judgment under Section 5242, U. S. Revised Statutes?

2. Are the rights claimed by plaintiff, to attachment againt the defendant before judgment, and to the jurisdiction thereby acquired, preserved and given by Section 4 of the Act of Congress of July 12, 1882?

The Court of Appeals of New York affirmed the Appellate Division (21) and the judgment was removed to this Court by writ of error (26) upon assignments covering the above mentioned questions (25).

ASSIGNMENT OF ERRORS.

Now, March 2, 1904, comes the above plaintiff and files herewith his petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

I. In ordering that the order of the appellate division of the Supreme Court of the State of New

York, granting the motion to vacate the attachment, be affirmed:

II. In answering the first question: "Is the defendant exempt from attachment before judgment under Section 5242 of the United States Revised Statutes?" in the affirmative:

III. In answering the second question: "Are the rights claimed by the plaintiff to attachment against the defendant before judgment and to the jurisdiction thereby acquired, preserved and given by section 4 of the Act of Congress of July 12, 1882," in the negative.

For which errors the plaintiff, Henry Van Reed, prays that the order of judgment of the Court of Appeals of the State of New York, dated January 20, 1903, be reversed, and a judgment entered for the plaintiff, Henry Van Reed, and for costs.

THE ARGUMENT.

The point involved is whether the property of a non-resident solvent National Bank can be attached before judgment as a means of acquiring jurisdiction of the defendant for the purpose of determining whether it is liable on the demand made by the plaintiff in the attachment.

The following Statutory Provisions are to be considered.

R. S. Section 5242.

Federal Statutes Annotated, Vol. V. p. 188.

Compiled Statutes, 1901, p. 3517.

"Sec. 5242.

Transfers, when void.

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding in any State, County or Municipal Court."

Act June 3, 1864, c. 106, sec. 52, 13 Stat., 115."

Act of July 12, 1882, c 290, Section 4, 22 Stat., 163.

Federal Statutes Annotated Vol V., p. 91 & 194.
Compiled Statutes, 1901, p. 3458.

"Corporate powers upon extension of period of succession; jurisdiction of suits by or against national banks.

"Sec. 4. That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: Provided, however, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking association may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be and the same are hereby repealed."

Act March 3, 1887, c. 373, sec. 4, 24 Stat, 554, revised by Act Aug. 13, 1888, c. 866, sec. 4, 25 Stat., 436."

Federal Statutes Annotated, Vol. V., p. 193-4.
Compiled Statutes, 1901, p. 514.

"Jurisdiction of suits by or against national banks,

as in cases between individual citizens of same State."

"Sec. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district court shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

Section 5242, Revised Statutes, as construed in the State Courts was held to apply only to cases of insolvent banks. Then came the decision of the Supreme Court of the United States in the case of Pacific National Bank *v.* Mixter, 124 U. S. p. 721, which does in terms state that under Section 5242 an attachment against a National Bank before judgment was void, whether the Bank was solvent or insolvent.

The Act of July 12, 1882, was passed *after* the Mixter proceedings were begun in the State Court, and hence the meaning of that Statute was not before this Court in the Mixter case.

Since its decision, the State Courts have assumed that the decision in the Mixter case as applied to solvent banks was not *obiter* and in the case at bar it was held in the State Court on the authority of the Mixter case that the Act of July 12, 1882,

did not make the attachment before judgment valid.

Points Submitted by Plaintiff in Error.

It is submitted that a review of the cases will show as follows :

(*a*) *What is said in the opinion of this Court in the Mixter case that all attachments before judgment against National Banks solvent or insolvent are void under Section 5242, is not only obiter but contradicts the judgment of the Court in the Mixter case, which upheld the jurisdiction of the Court below, acquired against the non-resident National Bank by reason of the attachments and sustained the judgments entered below in virtue of this jurisdiction, but restrained what was practically execution viz. proceedings on the bond to dissolve the attachment the bank being itself insolvent.*

(*b*) *Aside from this consideration subsequent statutes give jurisdiction to the State Court by attachment against non-resident National Banks before judgment, at least to the extent of bringing the defendant into Court and authorizing the rendition of judgment irrespective of what may follow.*

Pacific National Bank v. Mixter. 124 U. S. page 721, (1888).

The attachment proceedings in this case were in the Circuit Court of the United States for the District of Massachusetts, and were begun March 24, 1881. On November 20, 1881, the bank was placed in the hands of a receiver.

The bank gave bond to release the attachment. On March 18, 1882, the bank reopened with the consent of the Comptroller of Currency.

On May 22d, 1882, the bank having closed its doors for the second time, a receiver was appointed in accordance with the provisions of Section 5234, of the Revised Statutes.

The receiver then moved to discharge the attachments and to dismiss the suits. The Circuit Court refused the motion and gave judgments against the bank in each of the cases.

Failing in his motions and in his defences at law, the receiver filed a bill in equity in the Circuit Court against the several attaching creditors, and the sureties on the bonds given to dissolve the attachments so as to reduce to his possession the securities which were held by the sureties for their protection against liability, and to restrain the several attaching creditors from enforcing the attachment bonds on the ground among others "that the attachments made in said action were illegal and void."

The bill in equity was dismissed by the Circuit Court, 22 Federal Reporter, 694, and from that decree the appeal was taken to the Supreme Court of the United States.

The judgment (page 730), was "The judgments in each of the suits at law is affirmed, but the decree in the suit in equity is reversed and the cause remanded with instructions to enter a decree setting aside and annulling the bonds which were given to dissolve the attachment, and enjoining each and all of the creditors, and those claiming under them, from proceeding in any manner to enforce the same against the sureties, and directing the sureties to surrender to the receiver the securities they hold for their indemnity."

It is important to consider these details with great care because the action of the Court amounts to this.

That the attachments themselves before the declared insolvency of the bank, though declared void nevertheless, were valid for the purpose of acquiring jurisdiction of the person of the bank, and that the judgments entered in favor of the creditors were valid judgments, but could not be enforced through the bond given to dissolve the attachment.

Having reached this point, the Court found itself in this position that the jurisdiction obtained through the attachments themselves must be sustained and the action of the Circuit Court in sustaining them at least as ground for jurisdiction must be affirmed.

Going a step further, however, this separate question arose, what must be done with the assets of the bank, which had been deposited with the surety to protect it against the bonds given to dissolve the attachments, the bank now being in the hands of a receiver?

Now the distinction is quite apparent, and it is radical.

This Court by necessary implication said these attachments are not wholly void, they are good for the purpose of giving jurisdiction, *i. e.*, for bringing the attached bank into Court and enabling the Court to give judgment against it. But after the attachment was granted and after the assets of the bank were put up as security for the dissolution bond, the insolvency of the bank became known and open. The case was then presented of the receiver claiming these are assets of an insolvent bank in the hands not of the creditors who issued the attachment, but in the hands of a third party, and the Court was

asked to restrain the creditors from proceeding on the dissolution bond. This Court went that far and then stopped in its judgment.

The only question which arises in the case at bar of Van Reed plaintiff in error against the Lebanon National Bank, defendant in error, is the very point decided by this Court in the Mixter case, (irrespective of the Act of July 12, 1882, subsequently passed), viz., was the attachment itself void as a means of giving jurisdiction to the Circuit Court *to determine whether the Bank owed the attaching creditor any money.* This Court in the Mixter case necessarily upheld the attachment as a means of giving jurisdiction to the Circuit Court, to the extent of giving judgment against the bank and only stayed the creditors in proceeding on judgments which were affirmed when it became evident that the assets of the *then* insolvent Bank were being taken to satisfy those valid judgments.

In other words the only point that is before the Court in the case at bar is, was Van Reed's attach ment valid, to the extent of giving jurisdiction by bringing the Bank into Court, and this was the identical proposition that was decided by this Court in the Mixter case in favor of the attachment. This statement of facts shows most conclusively that the following remark of the Chief Justice in the Mixter case is *obiter.*

Page 727: "In our opinion the effect of the act of Congress is to deny the State remedy altogether so far as suits against National Banks are concerned, and in this way it operates as well on the Courts of the United States, as on those of the States. Although the provision was evidently made to secure

equality among the general creditors in the division of the proceeds of the property of an insolvent bank, *its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.*"

If this language was meant to announce that the Court below could not acquire jurisdiction by attachment to determine what the Bank owed to the plaintiff, it failed to so state. Had it so stated in so many words the language would contradict the formal judgment of the Court sustaining the judgments in the Court below obtained by these very attachments, bringing the non-resident National Bank into Court which this Court was in this very opinion sustaining by their judgment thereon as having been the valid basis for the entry of judgments against the Bank in the Court below.

It is submitted, therefore, that it is quite clear that the judgment of this Court in the Mixter case, amounts simply to this, that where there is a valid judgment in an attachment proceeding against a National Bank, which attachment was issued before judgment, the judgment is good, but it may not thereafter be used in a suit on the dissolution bond, where subsequently to the Court below acquiring jurisdiction by attachment and giving judgment, the bank has passed into the hands of a receiver.

Hence, it follows, as a last analysis that the only point actually authoritatively determined by the Supreme Court, was that in the particular case, although the judgments in the attachment proceedings were valid, the judgment creditor—*now that the bank was in the hands of a Receiver*—must

come in under Receivership proceedings to acquire its share of the funds of the insolvent bank. The *amount* of the claim was held to be validly determined by judgment in the Court below which only acquired jurisdiction of the person of the non-resident National Bank by the attachment.

Now in the case at bar, the Bank is solvent and under this very Mixter case, Van Reed was entitled to go on and get judgment. Whether he could go further is not before this Court.

If, however, it was the intention of this Court in the Mixter case to really broadly declare that in the case of a solvent bank section 5242 R. S. made it impossible for a court to acquire jurisdiction by attachment, it was clearly at variance with the judgment entered and the whole history of the case as reported shows this to be the fact.

Bank *v.* Mixter, U. S. Reports, 124, page 730 says:

> "*This will not affect the judgments* that the creditors have recovered, *any further than to limit their operation*, so far as the receiver and the sureties on the attachment bonds are concerned, *to the* adjudication of the debts as *claims entitled to dividends from the proceeds of the assets of the bank. To that extent, certainly, the Court had jurisdiction in each of the suits after the insolvency;* but as the attachments were void the judgments are inoperative *as a basis of recovery upon the bonds.*"

Prior to the decision of the Mixter case, various State courts had determined that R. S. Section 5242 only applied to cases of insolvent National Banks. Since the decision of that case, the State Courts have treated the decision in the Mixter case as binding, even

in the case of solvent National Banks not noticing that the Mixter case to this extent was *obiter*, and even if not *obiter* in addition thereto not observing that this court on the Mixter case upheld the jurisdiction of the Court below, acquired by reason of the attachments and sustained the judgments, which could not, it is submitted be predicated upon the idea that appearing and giving bond to set aside the attachments could be considered as a voluntary appearance in a personal action.

Of course, this court could not in the Mixter case determine anything as to the effect of the Act of July 12, 1882, and the subsequent re-enactments thereof, as the attachments had been previously issued and could derive no force from these subsequent statutory provisions. This point has not been noticed in the subsequent State cases other than that at bar in error.

It is submitted that the question of jurisdiction under these subsequent acts of Congress is an open one for this court.

It is further submitted that the Mixter case itself has been questioned by this court, viz., in Earle *v.* Pennsylvania, 178 U. S., page 449 (1900). It is true that in that case the insolvent National Bank was attached merely as a garnishee.

Justice HARLAN in that case, p. 453, after saying that Section 5242 is to be construed in connection with the prior sections relating to insolvent banks, (page 454), says: "*Whatever may be the scope of Section 5242* an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within

the meaning of that section." This is precisely the reasoning of the case of Robinson *v.* Bank, 81 N. Y., 385 and Raynor *v.* Bank, 93 N. Y., 37, holding an attachment good against a solvent National Bank, and bad against an insolvent one.

Earle *v.* Conway, 178 U. S., page 456, Syl. (1900).

> "A receiver of a national bank may be notified, by service upon him of an attachment issued from a state court, of the nature and extent of the interest sought to be acquired by the plaintiff in the attachment in the assets in his custody; but for reasons stated in Earle *v.* Pennsylvania, *ante* 449, such an attachment *cannot create any lien upon specific assets of the bank in the hands of the receiver* * * * "

Joy *v.* St. Louis, 122 Fed. Rep. 525 (1903).

TRIEBER, Dist. *J.* "It is the settled law that the act of March 3, 1887, as corrected by the act of August 13, 1888, 25 Stat., 433 (U. S. Comp. St. 1901, page 507) was intended by Congress to contract the jurisdiction of the National courts, and that all doubts must be resolved against jurisdiction." In this case the Act of July 12, 1882, is not referred to.

Petri *v.* Commercial Bank, 142 U. S., page 649.

FULLER, *C. J.*, referring to the proviso of the fourth section of the Act of Congress of July 12, 1882, c. 290, says:

> "So far as the mere source of its incorporation rendered suits to which a national bank might be a party, cognizable by the Circuit Courts, that was taken away, but the jurisdiction which those courts might exercise in such suits when arising between citizens of different states

or under the constitution or laws of the United States, except in that respect, remained unchanged."

United States *v.* American Bell Telephone Co., 159 U. S., page 548., Syl. 2.

"Where the appellate jurisdiction of this court is described in a statute in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction; and any subsequent statute claimed to have that effect must be be examined in the light of the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it."

Ex parte JONES, 164 U. S., page 693.

Brown, *J.*, after referring to the Acts of July 12, 1882, March 3, 1887, and August 13, 1888, Section 4, for the Court continues:

"In Leather Mfrs. Bank *v.* Cooper, 120 U. S., 778, it was held by this Court that, under the act of 1882, *which was similar in its terms*, an action against a national bank could not be removed to the Federal Court 'unless a similar suit could be entertained by the same court by or againt a state bank in like situation with the national bank. Consequently so long as the act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank *because of the source of its incorporation*.'"

Garner *v.* Second National Bank 66 Fed. Rep. page 371 (1895).

LACOMBE, Circ. J. "The statutes of the United States expressly prohibit the issuing of an attachment against a national bank or its property before final judgment in any suit, action, or proceeding in any State court." Rev. St. U. S. sec. 5242; Bank *v.* Mixter, 124 U. S. 721."

This case makes no reference to the acts of July 12, 1882, and August 13, 1888.

Hower *v.* Weiss, 55 Fed., page 356 (1893) Syl. 3.

> "Rev. St. U. S., Sec. 5242, providing that no injunctions shall issue from a State court against a national bank before final judgment, does not deprive the Federal Circuit Court of power to issue such an injunction, or to continue, after removal of the case, an injunction previously granted by a State court. Bank *v.* Mixter, 8 Sup. Ct., Rep. 718, 124 U. S. 721, distinguished."

The injunction was sustained on the ground of inherent equity power in the United States Courts.

Continental National Bank *v.* Buford, 191 U. S., p. 119.

The Court, HARLAN, J., p. 123, construes the Act of July 12, 1882, March 3, 1887 and August 13, 1888 Section 4, and says, the necessary effect of this legislation was to make the national banks citizens of the states and to withdraw the jurisdiction of the Circuit Court when invoked, "simply upon the ground that they were created by and exercised their powers under acts of Congress. No other purpose can be imputed to Congress than to effect that result."

Norris *v.* Merchants' National Bank, 30 Ill., App. p. 54.

GRAY, *J.*, p. 55, citing Butler *v.* Coleman (*sic.*), —meaning Bank *v.* Mixter—124 U. S., 721, says:

> "It is undoubtedly true that before the "Act of July 12, 1882, amending the National "Banking Law, the effect of the voluminous "legislation by Congress in relation to national "banks, did prohibit the issuance of attach- "ments out of State Court against them. But- "ler *v.* Coleman (*sic.*), 124 U. S., 721."

(Undoubtedly this means Bank *v.* Mixter.)

> "Whether that Act which provides that "the jurisdiction for suits against them shall "be the same as, and not other than the juris- "diction for suits against banks not organized "under any law of the United States, removes "that prohibition, is a debatable question. It "is not necessary to consider it in this case, for "if the prohibition continues, it is a personal "privilege of the defendants, which they may "waive (Kenney *v.* Greer, 13 Ill., 432), as they "have done."

Holmes *v.* National Bank of Wilmington, 18 S. Car., p. 37.

The Court, August 1, 1882, sustained an attachment against a National Bank before judgment (issued in 1881) on the ground that R. S. 5242, was intended "to prevent discrimination between cred- "itors in cases of insolvency or bankruptcy."

The Act of July 12, 1882.

This introduces a new and unanswerable authority for the proposition that whatever may have been the former law, attachments against National Banks, before judgment, *when constitut-*

ing the basis of jurisdiction, are now to be sustained. Had the defendant in the case at bar, been a foreign State bank, with funds here, the New York Courts would clearly have had jurisdiction through attachment, to impound the funds. Hence under the Act of 1882, the same jurisdiction exists over the funds of a foreign national bank.

There is no answer to this argument. Unless it be so held, then it is not true that the jurisdiction for suits against National Banks is the same as for suits against State Banks, and the plain language of the statute is violated.

If the prohibition of Section 5242 be construed to include solvent banks, then the Act of July 12, 1882 conflicts, and being the later statute, must prevail.

The trend of legislation is distinctly toward removing from national banks any class privilege, or legel advantage of any description whatever.

Thus the Act of Congress of March 3, 1873, prohibited any attachment or injunction before judgment against any national bank (Mixter Case, 124 U. S., pp. 724, 725).

This was repealed, in its original independent position, but re-enacted in Section 5242 as a part of the provisions relating to insolvent banks, the plain inference being, as held in the Robinson case, that thereafter it concerned only insolvent banks.

Then comes the Act of July 12, 1882, which states broadly that National Banks shall be subject to the same jurisdiction as other banks similarly located, and repealing all inconsistent provisions, and finally comes the Act of March 3, 1887, as re-enacted August 13, 1888, providing that National Banks shall be deemed citizens of the States in which they

are located, for purposes of jurisdiction, under which it has been held that a Chicago National Bank can sue in Texas.

Petri *v.* Commercial National Bank, 142 U. S. 644.

If a Chicago bank can sue in Texas, why in all fairness should it not be suable there, if jurisdiction can be obtained? Surely only the most express statutory enactment (and none such exists) can justify a decision to the contrary.

So long as Section 5242 is limited in its application to insolvent banks, it rests upon a broad principle of justice, the conservation of assets for the equal benefit of creditors, which every one can approve.

If the Court goes beyond that, however, and notwithstanding the Act of July 12, 1882, it makes National Banks a privileged class, which is contrary to all standards, political or moral, of our country, and clearly against the policy of the law as laid down by Congress. Such a construction should be adopted only when unavoidable, which is not the case here.

In conclusion, we respectfully summarize the reasons which justify and require the reversal of the judgment below irrespective of the Act of Jnly 12, 1882.

1. All there is against it, is the Mixter case, a dictum, pure and simple.

2. The U. S. Supreme Court has itself questioned, and therefore nullified, the dictum, in the later case of Earle *v.* Pennsylvania (178 U. S. 449).

3. The dictum, on its face, violates elementary rules of construction.

The opinion of Chief Justice WAITE, after stating that from its incorporation among provisions for insolvent banks, the prohibition against attachment was evidently "intended as an aid to the enforcement of the principle of equality among the creditors of an insolvent bank," then goes on to say, that however that may be, as it was once an independent provision, the form of its re-enactment "does not change its meaning in this particular."

We think the fact that it was once an independent provision, was repealed as such, and subsequently re-enacted as a subsidiary clause in a section relating to insolvent banks, is evidence that it was thereafter intended to apply simply to insolvent banks.

4. Aside from the foregoing, the Act of July 12, 1882, is independent authority sustaining jurisdiction by attachment because it exists as to State Banks. This Act has not been construed by the U. S. Supreme Court, on the basis of accepting the Mixter dictum as law.

5. Modern public policy and the trend of modern legislation, are against making National Banks a privileged class, except so far as necessary to secure equal distribution of assets in the case of insolvency.

Jurisdiction of the State Court under the Act of July 12, 1882.

The proviso in this Act is as follows:

The words in italics would have to be written in by the Court in order to make it read as it has been construed by the New York Courts below:

"Provided, however, That the jurisdiction [*as to forum but not as to procedure*], for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction."

There is no ambiguity about these words. They have a perfectly plain meaning, and it is not a province of the Courts to make them mean anything else by judicial legislation, which is a vice of the decisions in the Court below.

There is not a word in the statute about "forum" or about "procedure." There is not a single word from which it can be even surmised that Congress had any such notion in its mind and it had not.

The object of the act is perfectly clear. It was a disabling act as to National banks, and to put National banks and State banks in exactly the same category as to jurisdiction, subject, of course, without stating it in words, to the right of a National bank of another State on account of the diversity of citizenship to have recourse to the Federal Courts.

This right they already had, and it was, therefore, not necessary to give it to them, and if the object of Congress was simply to deny jurisdiction on the mere ground of incorporation under a Federal statute, it could have said so, but Congress did not say so because its object was broader than this. It not only meant in the Act of 1882 and the subsequent statutes of 1887 and 1888, to prohibit National banks going into the Federal Courts where there was no diversity of citizenship, but it meant more to put National banks and State banks on the same level

in the State and Federal courts as to all questions of jurisdiction.

It is absurd on its face where jurisdiction is given by the use of that expressive technical term to interpolate into the statute a distinction between "forum" and "procedure," and not contained in the statute. Congress has not said that the "forum" shall be one thing and the "procedure" another, or that the forum is changed and the procedure is not changed. This whole thing is a figment of the imagination. If the words were ambiguous—which is not the case—the well settled canon of construction must prevail. The Court must consider, viz:

The old law

The mischief

The remedy.

Now what was the mischief? The doubt afterwards resolved by this Court into a certainty (if Mixter *v.* the Bank is not *obiter* as to solvent banks) that attachments and injunctions could not under the old law R. S. 5242 issue before judgment against a National Bank.

The mischief.

What was the mischief? It is a matter of common knowledge of which the Court will take cognizance, that there was and is a prejudice against National Banks being treated in any other or different way than State Banks are treated, and it has been the policy of the Federal law to avoid discrimination against State banks except in the one essential feature of preventing them issuing notes. Hence we know what the old law was or was supposed to be, and finally what it came to be, and we know wherein it was considered a mischief, and this

brings us to the remedy which is not given in the Act of July 12, 1882, unless free scope is given to its language by holding that in the case of a solvent National Bank the jurisdiction of the State Court, as to attachments before judgment is the same as in the case of a solvent State Bank.

Now as to a solvent State Bank, it is not disputed anywhere in the United States, that where non-resident, jurisdiction of such bank may be acquired by attaching its property before judgment, and clearly the Act of 1882, meant to put National Banks in the same category for all purposes whatever.

Of course, where a National Bank becomes insolvent, then other Federal statutes step in and halt the entire proceeding in the State Court, except as to ascertaining the amount due by the bank to its creditor.

The Act of insolvency and receivership by force of the Federal statute makes it impossible for the State Court to proceed further, and the creditor is in this position that having begun an action against a National Bank by attachment in a State Court, as against a non-resident corporation, the State Court can ascertain the amount of its debt and then under such attachment—the jurisdiction having been acquired by attachment—the creditor can claim relief through the receivership like any other judgment creditor or any creditor, who proves his claim through the receivership.

This is all that the plaintiff in error asks here, that the jurisdiction of the New York Court be confirmed to the extent of conferring jurisdiction to hear and determine the cause, to wit, whether the

Bank is indebted to Van Reed assignee and for what sum. Beyond that this Court need not go in this cause.

DEFINITION OF JURISDICTION.

American and English Encyclopedia of Law, Second Edition, Vol. 17, p. 1041-2.

"I. Definition.—Of the various definitions of jurisdiction perhaps the most satisfactory is as follows: Jurisdiction is authority to hear and determine a cause. Since jurisdiction is the power to hear and determine. it does not, as will be pointed out later, depend either upon the regularity of the exercise of that power or upon the rightfulness of the decisions made."

"II. Jurisdiction and Exercise of Jurisdiction Distinguished.—Jurisdiction should therefore be distinguished from the exercise of jurisdiction. The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction. When there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but the exercise of that jurisdiction."

"Note 1. 17 A. & E. E. L. p. 1041. Definitions of Jurisdiction.—There is perhaps no word in English law that has been more frequently defined that this of "jurisdiction." From the earliest times we find the question of its proper definition engaging the attention of jurists. Thus we find the following: "And jurisdiction is nothing else than to have the authority of judging, that is, of pronouncing judgment, between parties in actions, against persons or things according as they have been brought

into judgment by an authority either ordinary or delegated, concerning which we have spoken above concerning the powers of those who judge." Bracton De Legibus Angliæ (Master of Rolls, ed. 1883), vol 6, p. 159, or lib. 5 Tract. 5, fol. 400 V. "*Jurisdictio est potestas de publico introducta cum necessitate jurisdicendi*," 1 Bulst. 210. The case of Marshalsea, 10 Coke 73 a; or, as translated by Mr. Burrill: "Jurisdiction is a power introduced of common right (by public authority or for the common benefit,) arising out of the necessity of declaring the law."

"The right by which judges exercise their power." Hale's Anal. Sec. 11. "The power of hearing and determining causes, and of doing justice, in matters of complaint." Halifax Anal. v. 3, c. 8, num. 4.

"Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case." Reynolds *v.* Stockton, 140 U. S., 268; St. Louis, etc., R. Co. *v.* State, 55 Ark., 205; Falls *v.* Wright, 55 Ark., 565; Munday *v.* Vail. 34 N. J. L., 418.

Jurisdiction is defined to be the authority or power which a man hath to do justice in causes of complaint brought before him. Tomlins L. Dict.; Bucky *v.* Willard, 16 Fla. 332.

Note 2. 17 A. & E. E. L., p. 1041. Approved Definition.—United States, Daniels *v.* Tearney, 102 U. S., 418; Applegate *v.* Lexington, etc. Min. Co., 117 U. S., 267; Simmons *v.* Saul, 138 U. S., 454; Holmes *v.* Oregon, etc., R. Co., 5. Fed. Rep., 534, 9 Fed. Rep., 232, 6 Sawy. (U. S.) 285; 7 Sawy. (U. S.) 385; Grignon *v.* Astor, 2 How. (U. S.) 338; U. S. *v.* Arredondo, 6 Pet. (U. S.) 691; Decatur *v.* Paulding 14 Pet. (U. S.) 599; *in re* Bogart, 2 Sawy. (U. S.) 401, 3. Fed. Cas. No. 1,596; Le Roy *v.*

Clayton, 2 Sawy. (U. S.) 499, 15 Fed. Cas. No. 8,268; Riggs *v.* Johnson County, 6 Wall. (U. S.) 187; McNitt *v.* Turner, 16 Wall. (U. S.) 366; Cornett *v.* Williams, 20 Wall. (U. S.) 249.

Bank *v.* Mixter 124, U. S., p. 727-8, says: "While the law as it stood previous to the act of July 12, 1882, 22 Stat. 163, c. 290, sec. 4, gave the proper state and federal courts concurrent jurisdiction in all ordinary suits against national banks, it was careful to provide that the jurisdiction of the federal courts should be exclusive when relief by attachment or injunction before judgment was sought. Until the act of 1882 the federal courts had ample authority to grant injunctions in proper cases, and all a person need do to invoke that authority was to bring his suit in one of those courts. Whether since the act of 1882 this remains so is a question for the consideration of Congress. Some amendment to existing legislation may be necessary, but this does not shed any light on the interpretation of the old law. The difficulty arises from the change that has been made, not from the law as it stood originally."

It is not clear what this quotation means, particularly in its use of the words

> "Whether since the Act of 1882 this remains so is a question for the consideration of Congress. Some amendment to existing legislation may be necessary * * * "

What this Court said in Petri *v.* Commercial National Bank, 142 U. S. p. 649, is as follows:

"So far as the mere source of its incorporation rendered suits to which a national bank might be a party, cognizable by the Circuit Courts, that was

taken away, but the jurisdiction which those courts might exercise in such suits when arising between citizens of different States or under the Constitution or laws of the United States, except in that respect, remained unchanged."

What is said there must be taken to be no broader than what the case called for, and the case did not call for the Court deciding whether under the Act of July 12, 1882, an attachment before judgment might be issued against a solvent National Bank. The point actually decided was merely that there was no privilege of National Banks that was not shared in by all other litigants, who could invoke Federal jurisdiction by reason of diversity citizenship.

If this Court meant to go further and meant to decide that under the Act of July 12, 1882, an attachment would not lie against a National bank—as it would against a State bank—before judgment, it would have been very easy for the Court to say so.

Even then had it said so it would have *obiter dictum* because the question was not before the Court.

It is submitted that this does not decide that the jurisdiction in the Act of July 12, 1882, would not allow an attachment in a State Court against a solvent National Bank before judgment when used as a means of acquiring jurisdiction. If it had been intended for such purpose it would also have been *obiter* for the plain reason that the question was not before the Court at all. No attachment had been issued before judgment, and the syllabus clearly indicates that the point under consideration is:

All that was before the Court was what is stated in a few lines in the Syllabus, 142 U. S. p. 644.

> "A national bank, located in one State, may bring suit against a citizen of another State, in the Circuit Court of the United States for the District wherein the defendant resides, by reason alone of diverse citizenship."

The question is therefore clearly before this Court now in the case at bar, and must be determined by considering what was the meaning of the word "jurisdiction" in that Act, and what was the meaning of the repeal of the conflicting legislation.

In the Court below, Appellate Division, it was attempted to restrict the meaning of the word "jurisdiction", so as to prescribe the *forum* and not regulate the *procedure* (page 12). Petri *v.* Com. National Bank, 142 U. S., 644, is cited as authority for this proposition. From this judgment VAN BRUNT, *P. J.*, and O'Brien dissented (page 13).

The Court of Appeals of New York took the same view (page 23 and 24) and cited also Bank *v.* Mixter 142 U. S. 727, in support of the proposition that the Act of July 12, 1882, "did not repeal the prohibition by which the remedy of attachment is taken away altogether so that it cannot 'be used under any circumstances.'"

But this remark in Bank *v.* Mixter did not refer to the Act of July 12, 1882 at all. The Court was then speaking of R. S., Sec. 5242.

It is submitted that this question has not been decided by the Supreme Court of the United States, and is open for consideration now.

So far as Bank *v.* Mixter is concerned, as the attachments were issued before the passage of the Act of July 12, 1882, what is said by this Court in the Mixter case is clearly *obiter*.

Moreover what this Court therein said in regard to the Act of July 12, 1882, is quoted at length on page 26 of this brief.

It says nothing of any distinction in the grant of jurisdiction between "forum" and "procedure" and it is confidently submitted that under the Act of July 12, 1882, the Court below should be reversed and the jurisdiction of the State Court should be affirmed "to hear and determine" whether the People's National Bank of Lebanon, Pennsylvania, is indebted to Henry Van Reed, the plaintiff in error.

JAMES W. M. NEWLIN,
For Plaintiff in Error.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 229.

HENRY VAN REED,
Plaintiff in Error,

vs.

THE PEOPLE'S NATIONAL BANK
OF LEBANON, PENNSYLVANIA,

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

The judgment of the Court of Appeals affirmed an order of the Appellate Division of the Supreme Court of New York, in the First Department, which vacated an attachment granted against property of the defendant, a national bank. The errors assigned are the affirmance of that order and the declaration that the property of the defendant is exempt from attachment under Section 5242 of the United States Revised Statutes, notwithstanding Section 4 of the Act of Congress of July 12, 1882.

The plaintiff is the assignee of J. W. M. Newlin, a Philadelphia lawyer, who has an alleged claim for services against the defendant. The services were

rendered in Philadelphia, and the defendant has its place of business at Lebanon, Pennsylvania. The assignment was obviously made to a resident of New York in order to obtain an attachment and force a settlement, as no reason is given why suit was not brought in Pennsylvania, where the subject matter arose and where the parties reside (pp. 3 and 4).

The attachment was granted on the ground that the defendant is a foreign corporation, and the affidavits on which it was granted show that the defendant is a national bank, organized under the banking laws of the United States, and located and doing business at Lebanon, Pennsylvania (p. 2)

The defendant appeared specially and moved to vacate the attachment, specifying, as a ground, that the attachment was granted against a national bank, contrary to the statutes of the United States (p. 5).

The motion was denied, the learned Justice at Special Term handing down the following memorandum (p. 6):

"In opposition to my own judgment (see 124 U. "S. R., 721), and upon the authority of the cases "decided by the courts of our own State, the motion "to vacate the attachment will be denied, with $10 "costs (81 N. Y., 385; 93 *Id.*, 371). The question "ought to be settled by the Appellate Division."

The Appellate Division reversed the order made below and vacated the attachment (p. 7), Mr. Justice Laughlin writing the opinion of the Court (reported 67 App. Div. (N. Y.), 75).

An appeal from this order not being a matter of right, upon application of the plaintiff, the Appellate Division certified the following questions to the Court of Appeals (p. 8):

"1. Is the defendant exempt from attachment "before judgment under Section 5242, U. S. Revised "Statutes?"

" 2. Are the rights claimed by the plaintiff to at-
" tachment against the defendant before judgment,
" and to the jurisdiction thereby acquired, preserved
" and given by Section 4 of the Act of Congress of
" July 12, 1882? "

In affirming the order, the Court of Appeals answered the first question in the affirmative and the second in the negative (p. 14), Vann, *J.*, writing the opinion of the Court, in which all concurred (reported 173 N. Y., 314).

Thereafter, the plaintiff obtained a writ of error to this Court (pp. 26 and 27).

The defendant in error submits that under the statutes of the United States, as construed by this Court in *Pacific National Bank* vs. *Mixter* (*124 U. S., 721*), the judgment of the Court of Appeals was correct.

First.

The defendant in error, a national bank, is exempt from attachment before final judgment under Section 5242 of the United States Revised Statutes.

Section 5242 (Compiled Statutes, 1901, p. 3517) provides as follows:

" All transfers of the notes, bonds, bills of ex-
" change or other evidences of debt owing to any
" national banking association, or of deposits to its
" credit, all assignments of mortgages, sureties on
" real estate, or of judgments or decrees in its favor;
" all deposits of money, bullion or other valuable
" thing for its use or for the use of any of its
" shareholders or creditors; and all payments of
" money to either, made after the commission of
" an act of insolvency, or in contemplation thereof,
" made with a view to prevent the application of its
" assets in the manner prescribed by this chapter,
" or with a view to the preference of one creditor

" to another, except in payment of its circulating " notes, shall be utterly null and void; *and no at-* " *tachment, injunction or execution shall be issued* " *against such association or its property before* " *final judgment in any suit, action or proceeding* " *in any State, county or municipal court.*"

Section 52 of the National Currency Act of 1864 (*13 U. S. Stat. at Large, p. 115*) was as follows: " *And be it further enacted*, that all transfers of the " notes, bonds, bills of exchange, and other evidences " of debt owing to any association or of deposits to " its credit; all assignments of mortgages, sureties " on real estate or of judgments or decrees in its " favor; all deposits of money, bullion or other valu- " able thing for its use or for the use of any of its " shareholders or creditors; and all payments of " money to either, made after the commission of an " act of insolvency or in contemplation thereof, with " a view to prevent the application of its assets in " the manner prescribed by this act, or with a view " to the preference of one creditor to another, ex- " cept in payment of its circulating notes, shall be " utterly null and void."

Section 57 of the original act (*13 U. S. Stat. at Large, p. 116*), was as follows:

" *And be it further enacted*, That suits, actions " and proceedings against any association under " this act may be had in any circuit, district or ter- " ritorial court of the United States held within the " district in which such association may be estab- " lished, or in any state, county, or municipal " court in the county or city in which said associa- " tion is located, having jurisdiction in similar cases: " *Provided, however*, That all proceedings to enjoin " the Comptroller under this act shall be had in a " circuit, district, or territorial court of the United " States held in the district in which the association " is located."

In 1873, by the Act of Congress of March 3d of that year (*17 U. S. Stat. at Large, p. 603*), Section 57 was amended by the addition of the following clause:

"*And provided further*, that no attachment, in-
" junction or execution shall be issued against such
" association or its property before final judgment
" in any such suit, action, or proceeding in any State,
" county, or municipal court."

Then, in 1874, the Revised Statutes were enacted, in which Section 52 of the original act appears as Section 5242, with the addition of the foregoing clause added to Section 57 by the amendment of 1873 (except the word "such" before "suit, action," &c.), and in this form has remained to the present time, as quoted above.

The judicial construction of these statutes has been as follows:

In New York, the case of *Robinson* vs. *National Bank of Newberne, 81 N. Y., 385*, decided in 1880, held that an attachment could issue from the courts of that State against the property of a national bank located in another State. In that case the bank was solvent.

In *Raynor* vs. *Pacific Nat. Bank, 93 N. Y., 371*, decided in 1883, it was held that attachments against an insolvent national bank were prohibited.

As the law then stood in New York, an attachment could issue against the property of a solvent national bank, but not against one that was insolvent, and it was in accordance with this state of the law that the attachment in the case of *Bank of Montreal* vs. *Fidelity National Bank*, referred to below, was sustained by the Special Term in 1887.

In 1888, the Supreme Court of the United States construed Section 5242 in the case of *Pacific National Bank* vs. *Mixter, 124 U. S., 721*. This bank, situated in Boston, became embarrassed in November,

1881, and was placed in charge of a Bank Examiner until March, 1882. From the report of this case below (22 Fed. Rep., 694) it appears that when the bank resumed business in March it had an apparent surplus of nearly a million dollars, and the directors, the Bank Examiner and the Comptroller of the Currency all believed it to be solvent. Certain creditors began suits by attachment within a few days after the bank opened, and while it was doing business in the regular way. [The date "1881," in 124 U. S , at p. 722, seems to be a typographical error for "1882."] The bank gave bonds to discharge the attachments and continued to do business until May 20, 1882, a period of two months, during which time it received over $2,000,000 in deposits and paid all claims as presented, only failing when new difficulties arose. The Receiver, appointed in May, moved to set aside the attachments and for certain other relief. The attachments were upheld in the Circuit Court, because the bank was solvent when they were issued. Upon appeal to the Supreme Court of the United States, Chief Justice Waite delivered an opinion in which he said in part:

"In the view we take of the case, the most im-
" portant question to be considered is whether an
" attachment can issue against a national bank be-
" fore judgment, in a suit begun in the Circuit
" Court of the United States." After quoting the above provision from Section 5242 of the United States Revised Statutes, and tracing the growth of the entire section, he said: "It is clear to our minds that,
" as it stood originally as part of Section 57, after
" 1873, and as it stands now in the Revised Statutes,
" it operates as a prohibition upon all attachments
" against national banks under the authority of the
" state courts. * * * It stands now, as it did
" originally, as the paramount law of the land, that
" attachments shall not issue from state courts
" against national banks, and writes into all state

"attachment laws an exception in favor of national "banks. Since the Act of 1873, all the attachment "laws of the State must be read as if they con- "tained a provision in express terms that they "were not to apply to suits against a national "bank." He then said that the same rule applied to United States courts, which can issue attachments only in accordance with the provisions of State laws. "The law in this respect stands precisely as it would "if there were no State law providing for such a "remedy in any case. * * * In our opinion the "effect of the Act of Congress is to deny the state "remedy altogether, so far as suits against national "banks are concerned, and in this way it operates "as well on the courts of the United States as on "those of the States. Although the provision was "evidently made to secure equality among the "general creditors in the division of the proceeds "of the property of an insolvent bank, its opera- "tion is by no means confined to cases of actual or "contemplated insolvency. The remedy is taken "away altogether and cannot be used under any "circumstances."

The plaintiff in error seeks to show that this language is *obiter* and claims that the judgment in that case sustained the attachments as a means of acquiring jurisdiction, although vacating their lien on the property attached. But in that case the defendant bank was not non-resident, as stated in the brief for the plaintiff in error on page 12, and from the Massachusetts statutes cited on page 722 of the report it would appear that personal jurisdiction over the bank was obtained and that the attachments were incidental, and hence a judgment *in personam* could be entered, although the attachments were vacated. In the case at bar, personal jurisdiction over the defendant bank has not been acquired; it has appeared specially, not generally; the proceeding is purely *in rem*, and, upon vacating the attachment, this whole action falls.

While it seems to the defendant in error that, as the bank was apparently solvent and continued to do business for some time after the attachments were levied, the point actually decided in the Mixter case was that no attachment could issue against a solvent bank, yet in any view, the language is certainly explicit and was intended as an authoritative construction of the statute. It is believed that it has been accepted as such in every jurisdiction where the question has arisen since.

In *Bank of Montreal* vs. *Fidelity National Bank* (*112 N. Y., 667*) the order of the Court below vacating an attachment was affirmed "on the authority of Pacific National Bank *vs.* Mixter (124 U. S., 721)." No opinion was rendered, but all the Judges concurred. The opinion below in this case (49 Hun, 607; reported in full 17 N. Y. State Reporter, 88), shows that the defendant bank was treated as solvent, and the decision was made in pursuance of the judgment of this Court in the Mixter case. So, also, it appears in Judge Vann's opinion, in the case at bar, that Judge Gray, who was a member of the Court of Appeals when it made that decision, recalled that it was the intention of the Court to yield its previous views to those expressed by the Supreme Court of the United States on this subject (p. 23).

In Massachusetts an injunction against a solvent national bank was denied, on the authority of the Mixter case, Mr. Justice Holmes writing a well-considered opinion.

Freeman Mfg. Co. vs. *Nat. Bank of Republic, 160 Mass., 398.*

In Vermont the courts have held that national banks were not subject to attachment or injunction before final judgment.

Safford vs. *Nat. Bank of Plattsburgh, 61 Vt., 373.*

Hazen vs. *Lyndonville Nat. Bank, 70 Vt., 543.*

In Minnesota it has been held that an attachment against a national bank in another State was void, and as it could not confer jurisdiction the issuance of an injunction to restrain prosecution would be an idle ceremony.

First Nat. Bank vs. *La Due, 39 Minn., 415.*

In Tennessee the courts recognized the controlling authority of the Supreme Court in the interpretation of the Federal statute and sustained a plea that attachment against a national bank gave the Court no jurisdiction.

Rosenheim R. E. Co. vs. *Southern Nat. Bank, 46 S. W. Reporter, 1026 (Ch. App. Tenn.).*

In *Planters' Loan, &c., Bank*, vs. *Berry, 91 Ga., 264*, Blackley, *C. J.*, declared that bonds given to discharge an attachment against a solvent national bank were void, and fully accepted the doctrine of the Mixter case as a sound interpretation of the statute.

In *Dennis* vs. *First Nat. Bank of Seattle, 127 Cal., 453*, an attachment against a solvent national bank was dissolved as prohibited by the statute.

In *Garner* vs. *Second Nat. Bank, 66 Fed. Rep., 869*, Judge Lacombe set aside an attachment issued against a solvent national bank, on the authority of the Mixter case.

The decision in the Mixter case was not questioned, even indirectly, in the cases of *Earle* vs. *Pennsylvania, 178 U. S., 449*, and *Earle* vs. *Conway, 178 U. S., 456*, as stated by the plaintiff in error (p. 19 of Brief). The point was clearly not involved in those cases, and the Court so stated.

It is submitted that the decision of the Supreme Court of the United States, supported by the foregoing cases, has established the universally recognized principle that in no case can an attachment issue against a national bank, and, except for strong

reasons of public policy, a contrary doctrine should not now be introduced. It is needless to attempt to add any argument to the reasons contained in the opinions of the learned and eminent Judges in the cases cited, but the defendant in error calls the attention of the Court to the far-reaching importance of the principle involved in this case. The amount here concerned is trivial, but the decision will affect every national bank in the country outside of New York, for almost without exception every such bank keeps funds in the hands of its New York correspondent to meet its obligations there, and the security of these funds is of great value to the banking and commercial interests of the country.

Second.

The Act of Congress of July 12, 1882, Section 4 neither repealed the clause of Section 5242 in question nor gave any new or different right to creditors of national banks in regard to provisional remedies.

The act is as follows (22 U. S. Stat. at Large, 162):

" That any association so extending the period of
" its succession shall continue to enjoy all the rights
" and privileges and immunities granted, and shall
" continue to be subject to all the duties, liabilities
" and restrictions imposed by the Revised Statutes
" of the United States and other acts having ref-
" erence to national banking associations, and it
" shall continue to be in all respects the identical
" association it was before the extension of its
" period of succession. *Provided, however*, that the
" jurisdiction for suits hereafter brought by or
" against any association established under any
" law providing for national banking associations,
" except suits between them and the United States,

" or its officers and agents, shall be the same as, " and not other than, the jurisdiction for suits by " or against banks not organized under any law of " the United States, which do or might do banking " business where such national banking associations " may be doing business when such suits may be " begun. And all laws and parts of laws of the " United States inconsistent with this proviso be, " and the same are hereby, repealed."

This statute and similar legislation were considered in *Petri* vs. *Commercial Bank, 142 U. S., 644,* and *Continental National Bank* vs. *Buford, 191 U. S., 119.* By the first National Bank Acts, Circuit Courts of the United States had jurisdiction of suits by or against national banks because of their Federal origin as well as because of diverse citizenship. By the Act of 1882, Chapter 290, the jurisdiction arising from the Federal origin of national banks was taken away, but the jurisdiction arising from diverse citizenship remained, and the Acts of 1887, March 3, and of 1888, August 13, had the same purpose and effect, and no more.

" The necessary effect of this legislation was to " make national banks, for purposes of suing and " being sued in the Circuit Courts of the United " States, citizens of the States in which they were " respectively located, and to withdraw from them " the right to invoke the jurisdiction of the Circuit " Courts of the United States simply upon the " ground that they were created by and exer- " cised their powers under Acts of Congress.

" *No other purpose can be imputed to Congress* " *than to effect that result* " (by Mr. Justice Harlan, in *Continental National Bank* vs. *Buford, 191 U. S., 119, 123*).

Attachments, such as in the case at bar, give no jurisdiction over the person of any defendant but merely over the property levied on within the juris-

diction of the Court issuing the attachment, and a judgment entered in the suit affects only such property and not the person of the defendant or his general property (*Pennoyer* vs. *Neff*, *95 U. S., 714*).

The subject of jurisdiction is not involved in the case at bar, but merely the incident of provisional remedy and procedure. The statutes above referred to have therefore no application.

The claim made here by the plaintiff in error has been considered in several cases and the effect of the Act of 1882 is well stated by the learned Justice who wrote the opinion at the Appellate Division (p. 12):

" This statute is not inconsistent with the clause " of Section 5242 prohibiting the issue of warrants " of attachment, injunction and executions against " national banks by the State courts before judg- " ment. The Act of 1882 was intended to prescribe " the forum for litigations by and against national " banks, and does not relate to the provisional " remedy to be had in such actions. It was de- " signed to prescribe the place where, and the " courts in which, such actions may be prosecuted; " but it was not intended to regulate procedure in " such actions when brought."

After quoting this passage Judge Vann said (p. 24):

" Nor, we might add, was it intended to so regu- " late the method of commencing an action as to " enable a State court to acquire jurisdiction over " the property of a national bank without acquiring " jurisdiction of the bank itself."

See also

Raynor vs. *Pacific Nat. Bank*, *94 N. Y., 471.*

Freeman Mfg. Co. vs. *Nat. Bank of Republic*, *160 Mass., 398.*

Pacific Nat. Bank vs. *Mixter*, *124 U. S., 721.*

It is submitted that this construction is a sound interpretation of the statute and should be followed in this case.

Third.

The judgment of the Court of Appeals of the State of New York should be affirmed.

April 12, 1905.

PERCY S. DUDLEY,
Of Counsel for Defendant in Error.

Supreme Court of the United States.

No. 229.—October Term, 1904.

Henry Van Reed, Plaintiff in Error, vs. The Peoples' National Bank of Lebanon, Pennsylvania.	In error to the Court of Appeals of the State of New York.

[May 29, 1905.]

The plaintiff, who was the owner of a claim against the defendant, the Peoples' National Bank of Lebanon, Pennsylvania, commenced an action in the State of New York by levying an attachment upon the funds of the defendant in that State, upon the ground that it was a foreign corporation. The defendant, appearing specially for that purpose, moved to have the attachment vacated upon the ground that it was prohibited by the Revised Statutes of the United States. At special term the motion was denied; the appellate term reversed the judgment of the special term and vacated the attachment. The Court of Appeals answered two questions certified to it by the Appellate Division and affirmed the judgment of that court. The two questions propounded are as follows:

"1. Is the defendant exempt from attachment before judgment under section 5242, U. S. Revised Statutes?

"2. Are the rights claimed by plaintiff, to attachment against the defendant before judgment, and to the jurisdiction thereby acquired, preserved and given by section 4 of the act of Congress of July 12, 1882?"

The Court of Appeals, in affirming the judgment of the court below, answered the first question in the affirmative and the second question in the negative. The case was then brought to this court upon writ of error.

Mr. Justice Day delivered the opinion of the Court.

We deem the answer to the first question already determined by the decision of this court in *Pacific National Bank* v. *Mixter*, (124 U. S. 721.) The right of Congress to determine to what extent a State court shall be permitted to entertain actions against national banks and how far these institutions shall be subject to State control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by State

legislative or judicial action, except so far as the lawmaking power of the Government may permit. Section 5242 of the Revised Statutes of the United States is as follows:

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national bank association, or of deposits to its credit; all assignments of mortgages, sureties, on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any State, county or municipal court." (3 Compiled Statutes, 1901, p. 3517.)

The language of the latter clause of this section would seem to be too plain to admit of discussion as to its meaning. It in terms forbids the issuing of an attachment, injunction or execution against a national bank or its property before final judgment in any suit, action or proceeding in any State, county or municipal court. This was the view taken by this court in *Bank* v. *Mixter, supra.* The origin of section 5242, and its growth from previous enactments were pointed out by Mr. Chief Justice Waite, who delivered the opinion of the court in that case:

"It is clear to our minds that, as it stood originally as part of section 57, after 1873, and as it stands now in the Revised Statutes, it operates as a prohibition upon all attachments against national banks under the authority of the State courts. . . . It stands now, as it did originally, as the paramount law of the land, that attachments shall not issue from State courts against national banks, and writes into all State attachment laws an exception in favor of national banks. Since the act of 1873 all the attachment laws of the State must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank."

Since the rendition of that decision it has been generally followed as an authoritative construction of the statute holding that no attachment can issue from a State court before judgment against a national bank or its property. (*Freeman Manufacturing Co.* v. *National Bank of the Republic*, 160 Mass. 398; *Planters' Loan and Savings Bank* v. *Berry*, 91 Ga. 264; *First National Bank of Kasson* v. *LaDue*, 39 Minn. 415; *First National Bank of Safford* v. *First National Bank of Plattsburg*, 61 Vt. 373; *Rosenheim Real Estate Co.* v. *Southern National Bank*, 46 S. W. [Tenn.] 1026; *Garner* v. *Second National Bank of Providence*, 66 Fed. Rep. 369.) It is argued by the plaintiff in error that the decision in the Mixter case, *supra*,

should be limited to cases where the bank is insolvent; but the statement of facts in that case shows that at the time when the attachment was issued the bank was a going concern and entirely solvent so far as the record discloses. The language of Chief Justice Waite, above quoted, is broad and applicable to all conditions of national banks, whether solvent or insolvent; and there is nothing in the statute, which is likewise specific in its terms, giving the right of foreign attachment as against solvent national banks. We find nothing in the case of *Earle* v. *Pennsylvania*, (178 U. S. 449,) which qualifies the decision announced in the Mixter case. We therefore conclude that the Mixter case is applicable here, and the decision therein announced meets with our approval.

The answer to the second question involves a consideration of the act relating to national banks of July 12, 1882, sec. 4, (22 Stat. at Large, 162,) which is as follows:

"That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted, and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: *Provided, however*, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking associations may be doing business when such suits may be begun. And all laws and parts of laws of the United States inconsistent with this proviso be and the same are hereby repealed."

There is nothing in this section enlarging the right of attachment against national banks. Before the passage of this section Circuit Courts of the United States had jurisdiction of suits against national banks because they were corporations of Federal origin. It was the purpose of this legislation to deprive such banks of the right to invoke the jurisdiction of the Federal courts simply upon the ground that they were created by and exercised their powers under the acts of Congress. (*Petrie* v. *Commercial Bank*, 142 U. S. 644; *Continental National Bank* v. *Buford*, 191 U. S. 119–123.) It regulated the jurisdiction of the courts to entertain such actions against corporations of this character, and had nothing to do with the kind and character of remedies which could be had against them. Certainly there is nothing in the act repealing the prior provisions of section 5242, above quoted.

It is further insisted that whether or not the lien is absolute upon the property of the bank, jurisdiction is obtained of it by the issuing of the

attachment; but we cannot take this view. There was no personal service in the court of original jurisdiction, and the attachment being without the power of the court by reason of the terms of the Federal statute, no jurisdiction was acquired in the case, either over the person or property of the defendant. We see no error in the judgment of the Court of Appeals of New York, and the same is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.